Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act	)	
Competitive Bidding	)	

To: The Commission

REPLY COMMENTS

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SUMMARY

CIRI is one of the thirteen Regional Corporations established by Congress under the terms of the Alaska Native Claims Settlement Act. CIRI directed its initial Comments in this docket first to the constitutional issues raised by the Commission concerning its proposed minority preferences, then to the scope of those preferences and to the need for adequate safeguards to ensure that only the beneficiaries intended by Congress receive those preferences.

CIRI focuses these Reply Comments on three points that were addressed in its initial pleading and challenged by other commenters in this docket. First, CIRI supports the Commission's determination that intermediate scrutiny will be applied by a court reviewing the constitutionality of the proposed preferences. Moreover, contrary to the concerns of some commenters, the preferences mandated by Congress and implemented by the Commission will pass constitutional muster under intermediate scrutiny. However, if the Commission remains concerned regarding the granting of preferences solely on the basis of race or gender, CIRI demonstrates herein that the Commission can remain true to the intent of Congress by conditioning the receipt of a preference on a showing of economic disadvantage, not simply on the size of a business which was proposed as an alternative by some commenters. To implement this system,

the Commission should incorporate by reference a standard employed by the Small Business Administration to determine whether entities are economically disadvantaged and, therefore, are eligible for certain SBA program benefits.

Second, CIRI has demonstrated the need for unique spectrum block aggregation mechanisms for designated entities. Permitting those entities to aggregate the set-aside 20 MHz block with the 30 MHz blocks, and to join the set-aside blocks to the spectrum reserved for in-region cellular operators, will increase dramatically participation of the designated entities in the provision of spectrum-based services.

Third, contrary to the suggestions of a few commenters, the Commission must establish strict safeguards to ensure that only legitimate designated entities realize the benefits of the Commission's preference programs. Those safeguards include strict eligibility and anti-sham requirements, meaningful up-front payment and deposit plans, and effective anti-trafficking conditions applicable to licenses issued for set-aside spectrum blocks.

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Cook Inlet Region, Inc. ("CIRI"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these Reply Comments in the above-captioned proceeding.

I. INTRODUCTION

CIRI is one of the thirteen Regional Corporations established by Congress under the terms of the Alaska Native Claims Settlement Act ("ANCSA"). 43 U.S.C. §§ 1601 et seq. (1988). CIRI is owned by approximately 6,500 Athabascan, Eskimo, Aleut, Haida, Tlingit, and other Native American shareholders. A majority of those shareholders are women.

As CIRI demonstrated in its initial Comments in this docket, the Commission's proposals to implement the congressional mandate to foster the participation of minorities, women, and small businesses in the provision of spectrum-based services are effective means by which to

fulfill that statutory directive. CIRI directed its initial Comments first to the constitutional issues raised by the Commission concerning proposed minority preferences, then to the scope of those preferences and to the need for adequate safeguards to ensure that only the beneficiaries intended by Congress receive those preferences. As CIRI demonstrates herein, nothing in the comments filed in this docket effectively calls into question CIRI's conclusions regarding the Commission's proposals for implementing the mandate of Congress through minority preferences.

In response to the comments of several parties regarding the participation of certain "designated entities" in the provision of spectrum-based services, CIRI will focus these Reply Comments on three points central to the proposed preferences. First, CIRI will address the concerns raised by some commenters about the constitutionality of the proposed preferential measures and, in connection with that discussion, present an option to meet some of those concerns. Second, CIRI will address the need for unique spectrum block aggregation mechanisms for designated entities. Finally, CIRI will underscore the importance of establishing adequate safeguards to ensure that only legitimate and qualified designated entities receive the benefits Congress intended for them to receive.

II. CONSTITUTIONAL CONSIDERATIONS

A. The Proposed Minority Preference Provisions Will Pass Constitutional Muster

CIRI demonstrated in its initial Comments that the minority preference provisions enumerated by Congress and proposed by the Commission will pass constitutional muster on review. CIRI Comments at 7-19. Indeed, of the scores of commenters filing in this docket, very few question the constitutionality of the preferences enumerated by Congress in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). The vast majority of commenters that discuss preferential measures at all simply suggest what types of measures should be implemented by the Commission. Nonetheless, a small number of pleadings argue that some, or all, of the preferential measures could be vulnerable to court challenge.

For example, the National Telecommunications and Information Administration ("NTIA") maintains that "preferences tied to status regardless of economic circumstances could pose legal problems, depending on the standard of review."[1/] As CIRI demonstrated in its Comments, intermediate scrutiny will be applied by a court assessing the constitutionality of the designated entity preference programs implemented by the Commission under

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[1/] Comments of NTIA at 26 (emphasis added). See also Comments of BellSouth Corporation at 21 n.33; Comments of Sprint Corporation at 11.

Section 309(j)(4)(D) of the Budget Act. CIRI Comments at 7-10. A number of commenters agree with CIRI's conclusion.[2/] Applying this standard of scrutiny — as opposed to the higher strict scrutiny standard — is consistent with the recent decision of the U.S. Supreme Court in Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547, 564 (1990), and with the deference shown by the Supreme Court to acts of Congress involving minority preferences. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (noting the unique remedial power of Congress under the Constitution). And, as CIRI showed in its Comments, an examination of the proposed preferences in light of the intermediate scrutiny standard demonstrates that they will pass constitutional muster. CIRI Comments at 10-19.

With respect to that intermediate scrutiny examination, BellSouth Corporation argues there has not been the required factual record developed by Congress to support the conclusion that the proposed preferences are substantially related to the achievement of the important governmental purpose -- a key element of the intermediate scrutiny test.[3/] As the Commission recognized, Congress'

[2/] See Comments of American Wireless Communication Corporation at 7; Comments of BellSouth Corporation at 21 n.33; Comments of George E. Murray at 5-8; Comments of Sprint Corporation at 11.

[3/] Comments of BellSouth Corporation at 21 n.33.

purpose in directing the Commission to implement certain preferences was to provide greater economic opportunity for the members of the designated groups, including minorities. NPRM ¶ 73 n.48.

Although Congress made no specific findings as to the lack of economic opportunities for minorities when it enacted the spectrum auction provisions in the Budget Act, Congress has examined the issue of minority disadvantage both in and out of the communications field before. See, e.g., H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43, reprinted in 1982 U.S.C.C.A.N. 2261, 2287 (detailing congressional findings on the effects of past discrimination against minorities in the communications field). And, as the Supreme Court noted in the 1980 Fullilove decision — and reiterated in the 1990 Metro Broadcasting opinion — past congressional findings are an appropriate foundation on which to rest a minority preference regime. Fullilove, 448 U.S. at 502-03 (Powell, J., concurring) (quoted in Metro Broadcasting, 497 U.S. at 572).

Moreover, Congress has made clear its view — grounded in its considered judgment and its institutional expertise on minority preferences — that improved access to spectrum licenses will help to generate a variety of economic opportunities for the designated groups. That view is entitled to deference from reviewing courts. Fullilove, 448 U.S. at 490. Indeed, the Fullilove Court upheld similar

measures on this reasoning in that 1980 decision. Id. at 490-92. See also id. at 510 (Powell, J., concurring).

Therefore, as CIRI has shown, the record established by Congress in developing its institutional expertise on the issue of minority preferences supports a finding that the proposed preferences are substantially related to the achievement of an important governmental purpose. CIRI Comments at 10-19. Provided that the Commission ensures that only legitimate and qualified designated entities take part in the preference programs by establishing adequate safeguards, the preferential measures mandated by Congress and implemented by the Commission will pass constitutional muster.

B. The Commission Can Ensure the Constitutionality of the Preferences by Limiting Them to Disadvantaged Entities

Notwithstanding the preceding analysis, CIRI recognizes that a small group of commenters express reservations about the constitutionality of preference provisions applied on the basis of race or gender. As noted above, NTIA suggests that preferences based on race or gender without accounting for the economic circumstances of the recipients could be vulnerable to constitutional challenge.[4/] Moreover, other commenters suggest that the Commission should limit preferences to small entities —

[4/] Comments of NTIA at 26.

without regard to the racial or gender composition of the organizations — arguing that such an action would satisfy the congressional purpose of creating economic opportunity for those groups enumerated in the Budget Act while avoiding constitutional attack.[5] The Commission discussed this "option" in the Notice of Proposed Rule Making as well. NPRM ¶ 74.

If the Commission elects not to adopt preferences for the minority and woman-owned businesses enumerated by Congress because of its own constitutional concerns, the Commission should remain true to the intent of Congress by limiting the preferences not simply to small businesses, as urged by some commenters, but to small businesses owned by those who are disadvantaged.[6] As NTIA suggests, such a classification — based on economic circumstances rather than on race or gender status — would alleviate concerns over the constitutionality of such preferences.

When Congress declared that small businesses and businesses owned by minorities and women should be assured meaningful participation in spectrum-based services, its goal was to ensure the participation of groups that are

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[5] See Comments of Devsha Corporation at 3; Comments of Rocky Mountain Telecommunications Association and Western Rural Telephone Association at 21; Comments of Tri-State Radio Company at 14.

[6] See, e.g., Comments of Sprint Corporation at 8-9 (discussing access to capital — or the lack thereof — as a key dividing line between members of the enumerated groups).

disadvantaged by the presence of unique barriers to their participation in the telecommunications industry. Those barriers are based on race, gender, and lack of access to financing, and are manifested in the vast under-representation of those designated entities in the industry. Indeed, these circumstances are detailed in the Report of the FCC Small Business Advisory Committee ("SBAC Report"), where the SBAC explains that each of the designated groups faces different but equally imposing barriers to entry into the telecommunications industry. See SBAC Report at 1-5. At bottom, then, it is the fact of disadvantage that unites these otherwise dissimilar groups.

Therefore, if the Commission elects not to adopt race and gender-based preferences, it should adopt preferences to benefit those groups that are economically disadvantaged with respect to opportunities to participate in the provision of spectrum-based services. Under this system a preference would not be given solely on the basis of race or gender, nor would it be given solely on the basis of size.[7/] Rather, a preference would be given to an entity that could demonstrate that it was disadvantaged. In that way, the

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[7/] For example, a "small" business comprised of a group of white males with great personal net worth would be faced with neither the lack of capital nor the social disadvantages encountered by the groups about which Congress was concerned. Therefore, that small business would not be "disadvantaged," would not be within the group of businesses about which Congress was concerned, and would not receive a preference.

grant of a preference would comport with the intent of Congress.

Given the limited time in which the Commission must establish an auction regime, and the necessity of having a standard that is easy to administer, the Commission should employ a bright-line test that is already in use to implement the above-described preference policy. Specifically, CIRI urges the Commission to employ the standards already established by the U.S. Small Business Administration ("SBA") for determining whether a business is "economically disadvantaged" for the purposes of admission to the SBA Minority Small Business and Capital Ownership Development Program, otherwise known as the "8(a)" program. These existing economic disadvantage standards would be particularly useful to the Commission in establishing a preference system geared to the disadvantaged nature of the particular business entity, not simply to the size of the entity. The standards are set forth at 13 C.F.R. § 124.106 (1993).

In light of the goal of Congress to create economic opportunities for disadvantaged groups, the SBA's "economically disadvantaged" standards are preferable to other eligibility measurement options noted by the Commission. For example, the Commission discussed two alternative standards for assessing the eligibility of small businesses applying for preferences from the Commission.

See NPRM ¶ 77 n.51. The first is the SBA standard defining small businesses as those with a net worth at or under $6 million and an average net income (after Federal income taxes) for the preceding two years at or under $2 million, 13 C.F.R. § 121.802(a)(2)(i), and the second is the SBA small business definition linked to Standard Industrial Classification ("SIC") codes, 13 C.F.R. § 121.802(a)(2)(ii). See also SBAC Report at 20-21. As the SBAC report indicated, neither standard is appropriate here. Id.

The $6 million/$2 million ceiling is inappropriate because it is far too low for PCS, an industry in which participants will be required to furnish a great deal of capital to obtain a license, construct a facility, and provide services on a profitable scale. Id. Indeed, as the SBAC demonstrated, "[t]he service area and bandwidth recommendations would not be effective if the [eligibility] classification excludes independently owned and non-dominant firms with the wherewithal to construct PCS facilities that may cost from $50-100 million." Id. at 21.[8/]

The SBA size standard linked to SIC codes is also inappropriate for the Commission's purposes since it would expand the definition of eligible entities to include all those with up to 1,500 employees, regardless of the economic

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[8/] Others have echoed this criticism of the SBA size standard. See, e.g., Comments of Iowa Network Services at 16-17; Comments of Tri-State Radio Company at 6-10.

status of those entities. See 13 C.F.R. §§ 21.802(a)(2)(ii); 121.601. As the SBAC recognized, "[t]his threshold runs the risk that the vast majority of the entities covered by SIC Code 4812 [Radiotelephone Communications] would be eligible for bidding preferences and tax certificate assistance even though these entities face no special history of exclusion or economic disadvantage." SBAC Report at 21 (emphasis added).[2/] Therefore, to be consistent with Congress' intent, the Commission should employ the 8(a) program economic disadvantage standard for defining preferences if it does not provide preferences for the specific designated entity classifications enumerated in the legislation.

In sum, CIRI has demonstrated that the minority-based preferences established by Congress will pass constitutional muster, and that the Commission should give effect to the congressional directive by affording preferences to minorities to participate in the provision of spectrum-based services. However, if the Commission does not establish preferences for minorities, CIRI urges the Commission to adopt the economic disadvantage qualifications established by the Small Business Administration for the 8(a) program, and grant preferences to businesses that can demonstrate

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[2/] If the Commission adopts any form of the SBA's income or size standards, it must also adopt the SBA's affiliation rules (13 C.F.R. § 121.401) to guard against circumvention of those standards.

disadvantage under those standards. In that way, the Commission could still grant preferences to entities that Congress intended to help while avoiding the constitutional concerns raised by some parties in this proceeding.

III. AGGREGATION OF SET-ASIDES AND MTA/CELLULAR BANDS

As CIRI demonstrated in its Comments, the Commission must provide unique PCS spectrum block aggregation mechanisms for designated entities to ensure meaningful participation by them in the provision of spectrum-based services. CIRI Comments at 27-29. A number of commenters raise a similar point.[10/] For example, Iowa Network Services, Inc. comments that PCS "aggregation would allow designated entities to provide PCS on an economically competitive basis."[11/] Nonetheless, a number of the filings that support PCS aggregation mechanisms argue that the Commission should limit them only to aggregation of the spectrum in the two set-aside blocks.[12/] However, as CIRI demonstrated, broader PCS aggregation rules are necessary.

[10/] See Comments of American Wireless Communication Corporation at 33-34; Comments of Iowa Network Services, Inc. at 19; Comments of Minority PCS Coalition at 14; Comments of Rocky Mountain Telecommunications Association and Western Rural Telephone Association at 21.

[11/] Comments of Iowa Network Services at 19.

[12/] See Comments of Iowa Network Services, Inc. at 19; Comments of Rocky Mountain Telecommunications Association and Western Rural Telephone Association at 21.

First, the Commission should permit designated entities to aggregate the set-aside 20 MHz block with the 30 MHz blocks despite the 40 MHz aggregation ceiling imposed in the PCS Order. Second Report and Order in GEN Docket No. 90-314, FCC 93-451, ¶ 61 (rel. Sept. 23, 1993) ("PCS Order"). This will make the set-aside band attractive to PCS operators other than those eligible to bid on the band, and, in turn, will make the licensees of the set-aside frequencies more likely to develop successful PCS joint ventures.

Second, the Commission should permit designated entities to aggregate the 20 MHz set-aside block — or the 10 MHz block — with the spectrum held by in-region cellular operators who are limited under the PCS Order to a 10 MHz PCS allocation. PCS Order ¶ 106. As with the first aggregation proposal, this measure would increase the value of the set-aside blocks by making them attractive to other PCS providers who might otherwise be barred by the aggregation limits from seeking out the licensees of the set-aside frequencies for PCS joint ventures. Each of these mechanisms will also raise more money at auction by virtue of the increased value of the set-aside licenses. Thus, with one bold stroke, the Commission will avoid creating a "spectrum ghetto" in the set-aside blocks, enhance the value of those bands, and create the potential for the generation of greater revenue through the auction process.

IV. THE COMMISSION MUST ESTABLISH ADEQUATE SAFEGUARDS TO ENSURE THAT ONLY LEGITIMATE AND SERIOUS DESIGNATED ENTITIES PARTICIPATE

CIRI and others showed in their initial comments that adequate safeguards are necessary to ensure that the benefits of any auction preferences inure only to the groups that Congress intended to benefit. Those safeguards include strict designated entity eligibility requirements and anti-sham provisions that prevent groups with no legitimate designated entity affiliation from benefitting from preferences (CIRI Comments at 19-25),[13] meaningful up-front and deposit payment plans that ensure that only serious and qualified bidders can participate in an auction (id. at 46-47),[14] and effective anti-trafficking provisions that guard against speculation on the value of the set-aside licenses that are won at auction (id. at 49-53).[15]

Nonetheless, some commenters argue that less stringent limitations are required in order for designated entities to participate fully in the PCS industry. For

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[13] See also Comments of Alliance Telcom, Inc. at 6; Comments of American Wireless Communication Corporation at 36; Comments of Bell Atlantic Personal Communications, Inc. at 17 n.40; Comments of Liberty Cellular, Inc. at 6; Comments of McCaw Cellular Communications, Inc. at 19; Comments of Pacific Telecom Cellular at 6.

[14] See also Comments of AT&T at 33-35; Comments of GTE at 10; Comments of MCI Telecommunications Corporation at 13; Comments of Nextel Communications, Inc. at 16-17.

[15] See also Comments of AT&T at 28; Comments of NTIA at 27 nn. 58 & 60; Comments of Telephone and Data Systems, Inc. at 18.

example, several groups maintain that designated entities should be allowed to tender discounted up-front payments and deposits rather than the larger amounts proposed by the Commission.[16] Others suggest that up-front payments and deposits be waived altogether for designated entities.[17] Finally, some commenters urge that there should be no anti-trafficking limitations on PCS licenses, regardless of whether or not they are won in set-aside auctions.[18]

Although the aforementioned commenters argue that lowered standards are appropriate to assist designated entities in achieving greater participation in the provision of spectrum-based services, CIRI has shown in its initial Comments (at 19-25) that strict limitations are crucial to an effective — and constitutional — designated entity preference program. They are also critical to guaranteeing that only Congress' intended beneficiaries receive the benefits of the preferences established by the Commission.

In combination with the preferences implemented

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[16] See, e.g., Comments of the Rural Cellular Association at 18; Comments of Small Business PCS Association at 4; Comments of Small Telephone Companies of Louisiana at 18; Comments of Telepoint Personal Communications, Inc. at 3.

[17] See, e.g., Comments of the Public Utilities Commission of the State of California at 3; Comments of Tri-State Radio Company at 15; Comments of U.S. Intelco Networks, Inc. at 22-23.

[18] See, e.g., Comments of American Personal Communications at 8; Comments of Paging Network, Inc. at 27; Comments of Windsong Communications, Inc. at 5.

pursuant to the congressional mandate, and the aggregation mechanisms discussed above, strict safeguards will ensure the meaningful participation of legitimate and qualified congressionally-designated entities in the provision of spectrum-based services.

CONCLUSION

For the reasons stated above, and in CIRI's initial Comments, CIRI urges the Commission to adopt proposals to afford minorities — or, in the alternative, economically disadvantaged businesses within the meaning of the SBA regulations — enhanced opportunities to participate in the provision of spectrum-based services while establishing strict eligibility requirements and other safeguards to ensure that the preferences mandated by Congress flow to Congress' intended beneficiaries.

Respectfully submitted,

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